UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – ADMINISTRATION CHARGE – contractual liability – costs – paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 – reasonableness of administration charges

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MR VISHWAVEER RAMJOTTON

Appellant

-and-

BHAVIN PRAFULCHANDRA PATEL

Appellant

Re: 56B Morland Road,
Croydon,
Surrey,
CRO 6NB

Judge Elizabeth Cooke

Determination on written representations

Mr John Beresford for the appeal
Mr Steven Newman for the respondent

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") relating to service charges, administration charges and costs. The decision was first made on 27 January 2020, reviewed on 19 May 2020, and then reviewed again on 19 June 2020. In both the reviewed decisions the FTT decided issues that it had omitted to decide in the earlier version.

2. The appellant tenant, who was the respondent in the FTT, sought to appeal the decision on four grounds, and the Tribunal gave permission to appeal on two of those grounds; it directed that the appeal would be a review of the FTT's decision, conducted under the written representations procedure. Representations were drafted by Mr John Beresford of counsel for the appellant, and for the appellant landlord by its solicitor Mr Steven Newman. I am grateful to them both. I shall refer to the parties as "the landlord" and "the tenant".

The factual and legal background

3. The landlord is the freeholder of 56 Morland Road, Croydon, London CR0 6NB, which is divided into two self-contained flats. The landlord also holds a long lease of the ground floor flat, 56A, and the tenant holds a long lease of the first-floor flat, 56B.

4. The lease of the first-floor flat contains provision for the payment of service charges and administration charges to the landlord. The service charge is payable in advance; the tenant is required to pay 60% of the costs estimated to be incurred by the landlord each year. If there turns out to have been an overpayment once the actual costs are known then any surplus is to be put towards the reserve fund or the following year's charge. If there is a shortfall it is payable within 14 days of demand.

5. Clause 2 of the lease includes a covenant at 2(e) by the tenant to keep the flat and its fittings and installations in good repair, and makes provision at 2(f) for the landlord to enter the property and to give notice to the tenant of any work required to make good any defects for which the tenant was responsible. Clause 2(g) provides that if the work required is not done the landlord may enter on seven days' notice to do the work, and requires the tenant "to pay forthwith all costs and expenses reasonably and properly incurred in respect of such entry and the carrying out of such works". Further covenants by the tenant in clause 2 include:

> "(m) To make good all damage caused through the act or default of the Tenant …
>
> (i) to any part of the Building … and
>
> (ii) to any other owner occupier or tenant of the Building .. and … to keep the Landlord indemnified from all claims expenses and demands in that respect.

(r) To pay on demand all costs charges and expenses (including without limitation and on an indemnity basis legal costs surveyors' fees and fees of the lessor and/or management agents) of and incidental to:

> (i) The preparation and service of a Notice under Section 146 of the Law of Property Act 1925…
>
> (ii) The recovery of rents and other monies reserved in this Lease and made payable if the same are not paid at the times provided in this Lease …
>
> (iv) Any notice given by the Landlord under this Lease
>
> (v) Any schedule relating to wants of repair to the Property …"

6. From October 2018 to January 2019 the ground floor flat suffered water ingress from above; the landlord arranged for tracing work to be done and established that the source was the bathroom of the tenant's flat; on 23 January 2019 the landlord's agents wrote to the tenant setting out what needed to be done to fix the problem, reminding him of the terms of clause 2(g) of the lease, and continuing:

> "Please accept this letter as formal notice that in the event the works set out above are not undertaken within 7 days of the date of this letter … the landlord will request access to your flat and procure the undertaking of the required repairs with the cost of the same to [be] recovered from you under clause 2(g) above."

7. On 13 February the tenant was sent a demand for £880, said to be due under clauses 2(e), 2(f), 2(g), and 2(r)(iv) and (v) of the lease, in respect of expenses incurred prior to that notice, made up of an insurance excess of £250 charged for tracing the leak, £130 for a plumber, and £500 for the managing agents' work, carried out by their in-house solicitor, in preparing the notice requiring repair. I refer to that £880 as "the bathroom expenses".

8. Furthermore, in the early months of 2019 the ceiling of the common parts collapsed because of water ingress from the first floor. The tenant was sent a notice requiring him to put this right on 25 April 2019, and on 5th July he was sent a demand for £853.84 for expenses associated with that leak, to which I refer as the "ceiling expenses", said to be due under clauses 2(e), (m) and (r) of the lease.

9. On 7 March 2019 the landlord's agent, D & S Property Management, sent the tenant a demand for payment of £26,141.33 by way of service charge for the year 1 April 2019 to 31 March 2020 (the demand also included a reminder in respect of the bathroom expenses). The tenant failed to pay.

10. The landlord made three applications to the FTT:

a. On 15 July 2019 under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act")[1] for a determination of the appellant's liability to pay the advance service charge of £26,141.33 demanded in respect of the year 1 April 2019 to 31 March 2020.

b. On 15 July 2019 under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")[2] for a determination that the appellant was in breach of covenant because of (i) the leak from his bathroom into the flat below, and (ii) the partial collapse of the ceiling in the common parts of the building.

c. On 17 July 2019 under paragraph 5 of Schedule 11 to the 2002 Act for a determination as to whether the tenant was liable to pay administration charges amounting to £1,733 (being the bathroom expenses and the ceiling expenses referred to above).

11. I have footnoted the statutory provisions that do not require analysis in this decision, but we have to look more closely at the provisions of Schedule 11 to the 2002 Act. Paragraph 5 enables the FTT to determine whether an administration charge is payable under a lease, and in what amount, by whom and when. That the bathroom and ceiling expenses were administration charges is uncontroversial; paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") defines an administration charge (insofar as relevant here) as:

> "… an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
>
> … (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
>
> (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease."

12. Such a charge "is payable only to the extent that the amount of the charge is reasonable" (paragraph 2 of Schedule 11), and accordingly the landlord's application for a determination of whether the charges were payable required the FTT to determine whether they were reasonable.

13. In response, the tenant made applications to the FTT for the following:

[1] Section 27A of the 1985 Act enables the FTT to determine whether a service charge is reasonable and payable.
[2] Section 168(4) of the 2002 Act prevents a landlord from serving a notice to initiate forfeiture proceedings in respect of a breach of covenant by a tenant unless either the tenant has admitted the breach or a court or tribunal has determined that the breach occurred.

d. An order under section 20C of the 1985 Act[3], so as to prevent the landlord from recovering the costs of the FTT proceedings as part of the service charge.

e. An order under paragraph 5A of Schedule 11 to the 2002 Act reducing or extinguishing his liability to pay the landlord's litigation costs as an administration charge under the lease.

f. An order for costs against the landlord under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the FTT rules"). This application was made after the FTT's decision of 27 January 2020. The effect of rule 13 is that in proceedings such as these relating to service and administration charges the FTT can only make a costs order against a party who has acted unreasonably in bringing, defending or conducting the proceedings; the tenant said that the landlord has behaved unreasonable in its conduct of the proceedings.

14. Paragraph 5A of Schedule 11 to the 2002 Act provides:

> "(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
>
> (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.
>
> (3) In this paragraph—
>
> (a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings …" [including proceedings in the FTT]

15. The tenant's applications under section 20C and paragraph 5A were both aimed at protecting him from liability to pay the landlord's litigation costs in the future whether by way of service charge or as an administration charge; conversely of course the rule 13 application was intended to make the landlord liable to pay the tenant's costs. So all three of the tenant's applications, and none of the landlord's, related to the litigation costs incurred in the FTT. The applications under paragraph 20C and under paragraph 5A of Schedule 11 each related to costs payable because of a contractual obligation in the lease, arising from the agreement made between the original landlord and tenant. Rule 13 of the FTT rules, by contrast, regulates the FTT's own power to order a party to pay the other's costs in proceedings before it.

16. Paragraph 5A of Schedule 11 was enacted so that proceedings can be brought to an end without the potentially endless loop that arises where a landlord seeks to recover litigation

[3] Section 20C(1) provides: " A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before … the First-tier Tribunal … are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

costs, after the litigation has come to an end, by way of an administration charges, the tenant then brings proceedings under paragraph 5 to challenge the reasonableness of those charges, and then again after that second round of litigation comes and end the landlord demands further administration charges to recover its costs, and so on. Paragraph 5A enables the tenant to challenge the costs "incurred or to be incurred" (see the explanation of these provisions set out in *Avon Ground Rents Limited v Child* [2018] UKUT 204 (LC), particularly paragraph 53). Thus the tenant's application in this case anticipated a future demand for administration charges by the landlord to recover his costs of the FTT proceedings by way of service charge, and enabled the FTT to consider those future charges and either extinguish or reduce them, or indeed to refuse to do either.

17. Paragraph 5A of Schedule 11 does not, of course, enable the FTT to make a costs order in the proceedings. A tenant's contractual liability to pay costs under the lease will arise only when the relevant administration charge is demanded, and the order made by the FTT on an application under paragraph 5A may reduce or extinguish liability under such a demand.

The FTT's decisions

18. The FTT made a number of decisions in response to those applications. The only ones for which permission to appeal has been given are (1) the FTT's order in the May review that the tenant pay the landlord his litigation costs in the sum of £19,177.63, and (2) its decision in the June review on the landlord's application under paragraph 5 of Schedule 11 to the 2002 Act about the bathroom expenses.

19. In order to explain and consider the grounds of appeal I have to go through the three stages in which the FTT made its decisions. Each written decision begins with a summary of what has been decided in paragraphs numbered (1), (2) etc, followed by a statement of its reasons in paragraphs numbered without brackets, 1, 2 etc.

The decision of 27 January 2020

20. In its decision in January 2020 the FTT decided as follows:

    a. The tenant was liable for the service charges as demanded. There is nothing further to be said about that in this decision since permission to appeal has been refused.

    b. The tenant was "not in breach of the lease in relation to the water leaks" (quoting from the FTT's paragraph (2) in the summary of its decisions).

    c. At paragraph 83 the FTT said that because the tenant was not in breach "in relation to the water leak into the hallway" "we disallow the costs claimed in relation to the alleged breach of the lease."

It became clear in correspondence following the decision that the tenant understood the FTT to have decided that he was not in breach in respect either of the bathroom leak or of the ceiling damage, because of the reference to "leaks" in the plural in the FTT's summary paragraph (2) (see item b above), whereas the landlord took paragraph (2) to refer only to the ceiling collapse because of what was said in paragraph 83. Accordingly it is not clear whether in paragraph 83 the FTT was disallowing just the ceiling expenses or also the bathroom expenses.

21. At paragraph 85 of its decision the FTT referred to the applications by the tenant under section 20C of the 1985 Act and paragraph 5A of Schedule 11 to the 2002 Act and asked the parties to make submissions on both matters within 14 days, "including time sheets and details of hours spent".

22. There was no mention of the application for costs under rule 13 which I believe was made after the hearing. In response to the invitation to make submissions on costs the tenant served written submissions encompassing all three of its applications. The landlord in response made it clear that while he did not intend to recover his litigation costs as a service charge, he did intend to recover them as administration charges. He also asked the FTT to review its January decision on the basis that it had failed to deal with the section 168(4) application in relation to the bathroom leak (b above) and also, therefore, with the landlord's paragraph 5 application in relation to the bathroom expenses.

The May review

23. In its May review the FTT determined that although the appellant was not in breach of covenant in respect of the ceiling collapse, he was in breach so far as the bathroom leak was concerned. There is no appeal against that.

24. The FTT also declined to make an order on the tenant's section 20C application on the basis that it was unnecessary because the landlord had confirmed that it would not seek to recover his litigation costs in the service charge. Permission to appeal that decision has been refused, on the basis that it is academic since the landlord does not intend to make that charge.

25. With applications a, b and d (using my lettering) disposed of, the FTT now had to deal with:

    c. the landlord's application under paragraph 5 relating to the bathroom expenses,

    e. the tenant's application under paragraph 5A relating to litigation expenses and possibly also to the bathroom expenses, and

    f. the rule 13 application.

26. These three applications are introduced by the FTT in paragraphs 14 of its reasons under the heading "Costs". Paragraph 14 refers first to the rule 13 application and then says:

> "The applicant applied under paragraph 5A of Schedule 11 of the [2002 Act] for their costs and for contractual costs under the lease in relation to the S.168(4) application."

27. There are two errors there; the landlord had not, of course, applied under paragraph 5A; I take it that the landlord's application under paragraph 5 was intended. More seriously, the landlord's paragraph 5 application related only to the bathroom and ceiling expenses, i.e. only to contractual costs. It did not relate to an order for costs that the FTT might make subject to rule 13 of the FTT rule.

28. Next the FTT said:

> 15. "The tribunal has read the lease and considers that Clause 2(r)(ii) places an obligation on the respondent to pay costs incurred as a result of non-payment to the landlord. This includes costs of surveyors, managing agents and legal costs. These are the contractual costs referred to in this decision.
>
> 16. In addition, Paragraph 5A to Schedule 11 of [the 2002 Act] enables a tenant to make an application to this tribunal to prevent a landlord from recovering litigation costs."

29. The following paragraphs 17 to 21 make no further reference to the rule 13 application, and no reference to the £1,733 claimed by the landlord under his paragraph 5 application. Instead, the discussion is solely about the litigation costs incurred by the landlord in his applications to the FTT under section 27A and section 168(4). The FTT concluded:

> "The tribunal therefore finds the respondent to be liable for the costs claimed in relation to the S.27A and S.168(4) applications, bar those relating to the collapsed ceiling, to be reasonable and payable by the respondent.

30. In its opening paragraphs, summarising its decisions, it said:

> "(4) The tribunal determines that the application by Mr Ramjotton for costs under Rule 13 of the Tribunal's Procedure Rules fails and that he is not entitled to recover any of his costs from the applicant in relation to this application.
>
> (5) the tribunal determines that the rate of £250.00 per hour for an in-house solicitor is reasonable in relation to these applications.
>
> (6) The tribunal therefore determines that the applicant's applications under Paragraph 5 to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 succeeds, in relation to the S.27A application and the application under S.168(4) in relation to the bathroom leak, but not in relation to the ceiling costs."

> (7) The total amount of those costs is assessed at £15,612.00 in relation to the S.27A application and £3,565.63 contractual costs in relation to the S.168(4) application, total £19,177.63…
>
> (9) The tribunal determines that the Respondent shall pay the Applicant the sum identified in this decision within 28 days of this decision."

31. So the rule 13 application was dismissed, without any reasons; reasons were, however, given in paragraphs (2) and (3) of the June review and I need say no more about that. Although the decision that the appellant must pay £19,177.63 is presented as a response to the landlord's application under paragraph 5 of the 2002 Act, that £19,177.63 represented litigation costs, which did not fall within the scope of the landlord's application under paragraph 5. And no decision was made about what the landlord did claim under paragraph 5, namely £1,733 in relation to the two alleged breaches of covenant.

32. The appellant therefore says that the FTT made a costs order without jurisdiction. There is no jurisdiction to award costs in this type of proceedings save under rule 13, and the landlord had not made an application under rule 13.

The June review

33. In its June review the FTT addressed the landlord's paragraph 5 application and said that the tenant "is liable for the costs claimed by the applicants in relation to the bathroom leak, amounting to £880. This sum is made up of the insurance excess (£250.00), the plumbers' costs (£130.00), and the in-house legal fees (£500)." No explanation is given for the liability; nothing is said about the provision in the lease under which the expenses are payable, and nothing is said about their reasonableness. The tenant says that he is not liable for those charges under the lease or, if he is, that they are unreasonable.

34. I can now deal with the two appeals in turn.

The appeal from the decision that the tenant must pay £19,177.63

35. As we saw above, the FTT in paragraph (6) of its decision summary referred to the landlord's application under paragraph 5, which is said to succeed in relation to the section 27A application and the bathroom leak and to give rise to a liability for £19,177.63; but the application under paragraph 5 was not about litigation costs.

36. Once the FTT had disposed of the section 20C application the only applications before it that related to the litigation costs were the tenant's applications under rule 13 and paragraph 5A. The landlord concedes that the order was not made under rule 13, and that must be right because had the FTT contemplated making an order under rule 13 against the tenant it would have had to give the tenant the opportunity to respond to that proposal and it would have had to follow the reasoning process set out in *Willow Court Management Co (1985) Limited v Alexander* [2016] L&TR 34.

37. Instead, Mr Newman for the landlord argues that the costs order was properly made in response to the tenant's paragraph 5A application. It is unsatisfactory to interpret the order in that sense when that is not what the FTT said it was doing in paragraph (6) of the May review. Nevertheless I take the view that is the only thing the FTT could have been doing, and I note that it had the paragraph 5A application in mind in paragraph 16 of its reasoning if not at paragraph (6) of its decision summary. Moreover in paragraphs 17 to 20 the FTT looked both at the reasonableness of the landlord's costs (albeit briefly, looking only at the solicitor's hourly rate) and at whether the tenant ought to bear the costs of the litigation. That reasoning could only have been relevant to the application under paragraph 5A (and see further at paragraph 45 below); so was the FTT's conclusion at paragraph 21:

> "The tribunal therefore finds the respondent to be liable for the costs claimed in relation to the S.27A and S.168(4) applications, bar those relating to the collapsed ceiling, to be reasonable and payable by the respondent."

38. It is difficult to make sense of that sentence because of the obvious grammatical mishap; but it is clearly the sort of conclusion that the FTT might have reached on the paragraph 5A application. However, its decision summary at paragraphs (6) to (9) is not. Paragraph (6) refers to the wrong application. And paragraph (9) appears to be a costs order (see paragraph 30 above).

39. The FTT was empowered, as we have seen, to make "whatever order it considers to be just and equitable", but that is not a power to make a costs order in the form seen in the May review. The FTT's order has to relate to the tenant's application to reduce or extinguish the administration charges. The power in paragraph 5A to do what is just and equitable is not inconsistent with and indeed does not have any impact on the limitations on costs orders in rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Paragraph 5A was enacted in response to the commonplace situation where the FTT cannot make an order for costs (because the special grounds in rule 13 are not made out), yet the landlord has a contractual power to recover costs by way of administration charges, and it is that contractual power that the FTT can control when making an order under paragraph 5A. It is open to the FTT to say that the landlord should not recover any litigation costs by way of administration charge – just as section 20C of the 1985 Act enables it to order in relation to service charges - or to say that certain elements of the costs could not be recovered, or to decline to make such an order.

40. I need say no more to conclude that the decision that the appellant should pay the landlord's costs in the sum of £19,177.63 was made without jurisdiction, first because it was said to be made in response to the landlord's paragraph 5 application when in fact it could only have been a response to the tenant's paragraph 5A application, and second because it was not a proper response to the paragraph 5A application. It is set aside.

41. The effect of that is to leave undetermined the tenant's application under paragraph 5A of Schedule 11 to the 2002 Act, because either the FTT did not decide it, or it did decide it and its decision is set aside.

42. I then have to consider how the Tribunal should respond to the tenant's application under paragraph 5A; it can be remitted to the FTT, or the Tribunal can substitute its own judgment. The written submissions before me make it possible to do the latter.

The tenant's application under paragraph 5A

43. The tenant's liability to pay the landlord's litigation costs by way of administration charge arises under clause 2(r)(ii), quoted at paragraph 5 above, since the service charge and the bathroom expenses were monies reserved by the lease. The contractual liability is to pay them on an indemnity basis, which means that questions of proportionality do not arise.

44. The relationship between paragraphs 2 and 5A of Schedule 11 to the 2002 Act has not previously been the subject of argument and decision in this Tribunal. Paragraph 2 says that administration charges are payable only insofar as the amount of the charge is reasonable, while paragraph 5A enables the FTT to make whatever order is just and equitable on an application to reduce or extinguish an administration charge in respect of litigation costs. The amount of the costs incurred by a landlord might be perfectly reasonable yet it may not be just and equitable for the tenant to pay them because he was successful in the FTT. In those circumstances the FTT would make an order extinguishing the tenant's liability for those costs and the question of reasonableness would not arise.

45. Where the tenant was unsuccessful in the FTT a variety of questions may arise. It might be found to be just and equitable for him to pay the landlord's costs by way of administration charge (even though he was not liable to pay costs under rule 13); where the FTT makes that determination, should it also assess the reasonableness of the costs? If it does, would that create an issue estoppel preventing further litigation on that point? If it does not, could the tenant to make an application later under paragraph 5 of Schedule 11 for reasonableness to be determined? Where the tenant was partially successful, is it open to the FTT to assess reasonableness of the landlord's costs and then reduce the tenant's liability by ordering that he pay a proportion of them by way of administration charge, thus preventing a further round of proceedings?

46. As we have seen (paragraph 37 above) the FTT purported both to assess the reasonableness of the landlord's costs and to determine whether it was just and equitable for the tenant to pay them, although its assessment of reasonableness was very brief and dealt with just one figure, namely the solicitor's hourly rate. As we shall see (paragraph 51 below), the tenant had not made detailed submissions on reasonableness.

47. Mr Beresford for the tenant engaged with this issue in his costs submissions made on 10 February 2020 in response to the FTT's directions. He argued that the principles applicable to a section 20C application are equally applicable to a paragraph 5A application. Section 20C reads as follows, so far as relevant:

> "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before

> … the First-tier Tribunal, or the Upper Tribunal …are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
>
> (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

48. Just as in paragraph 5A, therefore, the court or tribunal may make whatever order it considers just and equitable. Mr Beresford relies upon the Tribunal's observations about section 20C in *Church Commissioners v Mrs Khadia Derdabi* [2011] UKUT 380 (LC), where HHJ Gerald said:

> "18. In very broad terms, the usual starting point will be to identify and consider what matter or matters are in issue, whether the tenant has succeeded on all or some only of them, whether the tenant has been successful in whole or in part (i.e. was the amount claimed in respect of each issue reduced by the whole amount sought by the tenant or only part of it), whether the whole or only part of the landlord's costs should be recoverable via the service charge, if only part what the appropriate percentage should be and finally whether there are any other factors or circumstances which should be taken into account.
>
> 19. Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs *via* the service charge. By parity of reasoning, the landlord should not be prevented from recovering *via* the service charge his costs of dealing with the unsuccessful parts of the tenant's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights. …
>
> 22. Where the landlord is to be prevented from recovering part only of his costs *via* the service charge, it should be expressed as a percentage of the costs recoverable. The tenant will still of course be able to challenge the reasonableness of the amount of the costs recoverable, but provided the amount is expressed as a percentage it should avoid the need for a detailed assessment or analysis of the costs associated with any particular issue.
>
> 23. In determining the percentage, it is not intended that the tribunal conduct some sort of "mini taxation" exercise. Rather, a robust, broad-brush approach should be adopted based upon the material before the tribunal…"

49. Accordingly the tenant's position, repeated in submissions made in response to the landlord's grounds of objection to the appeal, is that all the FTT can do is to determine whether it is just and equitable for the tenant to pay the landlord's costs, leaving

reasonableness to be determined in a future application, as is in a case where the FTT declines to make an order under section 20C of the 1985 Act in relation to service charges; the issue of reasonableness does not arise until the service charge is demanded. Because the FTT had ordered the landlord to produce time sheets, the argument was made that the managing agent's solicitor's hourly rate was unreasonable. But the tenant at this point had not seen the landlord's schedule of costs.

50. Mr Newman in his submissions for the landlord on 10 February 2020 (and therefore before he had seen the tenant's submissions) did not argue that there should be an assessment of reasonableness. His concern was to allocate the costs incurred between the section 27A application, where the landlord had been successful, and the other issues before the FTT (and was of course hampered by the fact that liability for the bathroom leak, and the paragraph 5 application, remained undecided).

51. On the date when the tenant's costs submissions were made he had not seen the landlord's schedule of costs; and when Mr Beresford replied to the landlord's submissions on 28 February 2020, consistent with the position already argued on 10 February, he did not address the reasonableness of the costs in the landlord's schedule.

52. So the Tribunal can consider only whether, and to what extent, it is just and equitable for the tenant to pay the landlord's litigation costs by way of administration charge, and if the tenant wishes to challenge the reasonableness of costs that are found to be chargeable to him in that way he may do so under Schedule 11 to the 2002 Act in the usual way. The questions raised in paragraph 45 above must remain unanswered.

53. Turning then to whether it is just and equitable for the tenant to pay the landlord's costs, Mr Newman relies upon the Tribunal's decision in *Canary Riverside Development PTE Ltd v Schilling* (2005) where the Tribunal said:

> "13. …So far as an unsuccessful tenant is concerned, it requires some unusual circumstance to justify an order under section 20C".

54. Both parties take the view that the same principles apply to paragraph 5A as apply to section 20C, and I agree. In the present appeal I see no special circumstances that would point me to the view that the tenant should not pay the landlord's litigation costs insofar as the landlord was successful before the FTT.

55. The landlord was successful in his Schedule 27A application, which manifestly took up the bulk of the parties' and the FTT's time. The tenant points out that the FTT did find that certain charges the landlord proposed to incur were not reasonable. But the amount charged by way of advance service charge on the basis of the budget remained unchanged (because the FTT found that the reasonable elements of the proposed expenses exceeded the amount charged to the tenant in advance). So I find that so far as liability to pay costs by way of administration charges is concerned, the tenant should be regarded as having been unsuccessful in resisting the section 27A application.

56. The landlord was also successful in the section 168(4) application as regards the bathroom leak, and correspondingly in the paragraph 5 application in relation to the bathroom expenses, but unsuccessful so far as the ceiling collapse and associated expenses were concerned.

57. Me Beresford in his submissions of 10 February 2020 argued that the most the tenant should have to pay would be one third of the landlord's costs – at a point when the tenant took the view that the landlord had failed in relation to the bathroom leak as well as the ceiling collapse. He then argued that in fact the tenant should pay nothing, because of further issues such as the landlord's failure to engage in mediation. The landlord by contrast argued that of his total costs in the sum of £21,513.72, the section 27A application accounted for £15,612.00, the bathroom leak for £3,565.63, and the ceiling collapse for £2,336.09.

58. I regard Mr Beresford's submissions about the proportion of the costs attributable to the different matters as wholly unrealistic and I prefer the landlord's careful analysis. On that basis the costs attributable to the ceiling collapse amounted to 10.85% of the landlord's costs. Rounding that for ease of reckoning in the future I make an order reducing by 10% the tenant's liability to pay an administration charge in respect of the litigation costs incurred by the landlord before the FTT in these proceedings.

The appeal about the bathroom expenses

59. As we have seen, the decision in response to the landlord's paragraph 5 application was made in the June review. It could have been made in the May review once the FTT had determined that the bathroom leak, although not the collapsed ceiling, was the result of a breach of covenant; but despite an oblique and confusing reference to it in paragraph 14 the FTT appears to have overlooked it.

60. I take the view that the decision about the bathroom expenses was made – as the landlord's representative concedes – without the explanation to which the tenant is entitled. As Mr Beresford argues, there is no consideration of what, if any, clause in the lease makes the tenant liable to pay it and no consideration of whether the amount charged is reasonable. I therefore set aside the decision that the tenant is liable pay the £880 bathroom expenses by way of administration charge.

61. In view of the material available to me there is no difficulty in the Tribunal substituting its own decision on the paragraph 5 application.

62. The landlord argues that the costs were clearly payable under the lease. The managing agent's fee (being the costs of the agent's in-house solicitor) was incurred in preparation of the notice dated 27 January 2019, as was the insurance excess (being a charge for tracing the leak) which is also recoverable under clause 2(m), The plumber's costs, being the cost of fixing the leak, are said to be recoverable under clause 2(g).

63. Stepping back, it would be surprising if the tenant, having caused damage by the breach of covenant (water ingress from the bathroom leak), did not have to pay the costs of

setting that right, and it would be a strange lease that did not make him liable. I reject the tenant's argument that the letter of 27 January 2019 was not a notice served under the lease; it was a notice of the type described in clause 2(g). The insurance excess charge was a necessary preliminary to that notice, as was the managing agent's work, and I find that they are within the costs "of and incidental to" that notice. The plumber's fee clearly arises under clause 2(g), being the cost incurred by the landlord in setting the defect right. Alternatively, all three items are within clause 2(m) since both have the effect of indemnifying the landlord against potential claims from the ground floor tenant (and it is irrelevant for these purposes that the landlord held the ground floor lease).

64. There is no doubt that the charges are recoverable under the lease. And I see no realistic argument that the insurance excess and the plumbing costs were unreasonable; these charges are unsurprising and certainly not expensive in the context of diagnostic and remedial work for domestic plumbing problems. The managing agents' work, charged out at two hours of the in-house solicitor's time, is similarly unsurprising; the notice sets out a lot of detail and careful perusal of the lease will have been required. However, the charge has to be reduced since the notice of 27 January 2019 related also to another breach of covenant, which is not the subject of these proceedings and does not relate to the bathroom. I do not know whether it has been found or admitted that the tenant was indeed in breach of covenant in relation to that other matter. I therefore reduce the legal costs by one-third (rounded to £160).

65. Accordingly I determine, in response to the landlord's paragraph 5 application, that an administration charge of £720 in relation to the bathroom expenses is reasonable and payable by the tenant to the landlord.

Conclusion

66. The decision made in the May review that the tenant is to pay the landlord's costs in the sum of £19,177.63 is set aside. I substitute the Tribunal's order that the tenant's liability to pay an administration charge in respect of the litigation costs incurred by the landlord before the FTT in these proceedings is reduced by 10%.

67. The decision made in the June review relating to the bathroom expenses of £880 is set aside; the Tribunal substitutes its own decision that the tenant is liable to pay £720 by way of administration charge arising from the bathroom leak.

68. It will be seen that although the appeal succeeds on both grounds, as a result of defective reasoning and lack of explanation by the FTT, the tenant's liability to the landlord remains much the same.

Judge Elizabeth Cooke

8 February 2021